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Supreme Court, U.S.
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No. 01-838

IN THE

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

-and-

CECIL PARKER, *et al.*,

Petitioners,

v.

G. M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents, Defendants below ("Defendants"), argue against a grant of the writ on the grounds that no circuit splits exist either as to the power of a party to withdraw consent to a settlement or as to the necessity of consent by intervenors to a consent decree negotiated by the parties. Defs. Opp. 11-26. Defendants also assert that certiorari should be denied because the order was granted *sua sponte* and the portion of the Consent Decree at issue could be approved only if the entirety of the Decree was approved. Defs. Opp. 27-28. A second set of Respondents, Intervenors below ("Intervenors") join the Defendants in making the latter argument against granting the writ. Intvrs. Opp. 6-8. The circuit splits both on the question of the impact of a party's attempt to withdraw consent and on the power of intervenors are, however, extant and Respondents' efforts to reconcile the cases fail. The alternative "grounds" cited by Respondents were not the basis of the Eleventh Circuit's decision and do not affect the quality of this case as a vehicle for resolving the circuit splits.

The Eleventh Circuit's opinion rested on two legs. First, the court held that Defendants' opposition to Article 13, ¶ 4, on any ground, was a withdrawal of consent that barred the trial court from approving that portion of the consent decree. Alternatively, the Eleventh Circuit held that because the Intervenors did not consent to the entry of ¶ 4, the district court lacked the power to do so. Each of these holdings reflects a split in the circuits.

By its holding the Eleventh Circuit may factually have disappointed only one African-American college-trained engineer employee, see App. 39a at note 20, who is performing the same work as white college-trained engineers at substantially less pay. But the effect of its decision on the law governing consent decrees will have profound reverberations. If class action settlements can be undone by intervenors who assert no

independent claims or by a party that claims a change of heart before a decree receives final approval, settlements of large class actions will be virtually impossible to achieve. This Court should issue the writ of certiorari to resolve the two important circuit conflicts raised in this case.

I. THE "INTERVENOR CONSENT REQUIRED" CIRCUIT CONFLICT CANNOT BE DISTINGUISHED ON THE BASIS OF EQUAL PROTECTION AND TITLE VII RIGHTS COMMON TO ALL THE CIRCUIT DECISIONS AT ISSUE.

Defendants contend that the Eleventh Circuit's decision that non-minority intervenors must consent to settlement of minority employee's lawsuits is distinguishable from the decisions of other Courts of Appeals because the Eleventh Circuit based its decision on "'rights under the Equal Protection Clause, Title VII and state merit-system law.'" Def. Opp. 12 (*quoting Reynolds v. Roberts*, 251 F.3d 1350, 1357 n.12 (11th Cir. 2001), Pet. App. A-11a n.12). The Courts of Appeals that have reached the opposite conclusion about non-minority intervenors' rights to veto settlements, however, have considered the same Equal Protection, Title VII, and state merit-system rights as the Eleventh Circuit.

For example, the Second Circuit's decision in *Kirkland* reached the opposite result on the very same issue in the very same context as the current case — whether intervention by non-minorities affords them "equal standing with the original parties" so that "their consent would be required, and, in the event that they were dissatisfied with the agreement, they could then force a trial at which they would be permitted to defend the validity" of the underlying employment practice on the merits. *Kirkland v. New York State Dep't of Correctional Serv.*, 711 F.2d 1117, 1126-27 (2d Cir. 1983), *cert. denied, Althiser v. New York Dep't of Correctional Serv.*, 465 U.S. 1005 (1984). Contrary to the Eleventh Circuit, the Second Circuit held that

"[n]on-minorities do not have a legally protected interest in the mere expectation of appointments" and that such an expectation "does not require their consent as a condition to any voluntary compromise of the litigation." *Id.* In so holding, the Second Circuit considered the non-minorities' rights under state and local law, *id.* at 1127-1128, and adopted the Third Circuit's holding concerning non-minorities' Equal Protection and Title VII rights. *Id.* at 1126-27 (*citing EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-180 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978)). *See also EEOC v. American Tel. & Tel. Co.*, 556 F.2d at 173-180; *Airline Stewards & Stewardesses Ass'n v. American Airlines*, 573 F.2d 960, 963 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); *Dawson v. Pastrick*, 600 F.2d 70, 74-76 (7th Cir. 1979); *Youngblood v. Dalzell*, 804 F.2d 360, 364-65 (6th Cir. 1986), *cert. denied, Cincinnati Firefighters Union, Local No. 48 v. Dalzell*, 480 U.S. 935 (1987).

Defendants argue that the Eleventh Circuit merely followed this Court's decision in *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529-30 (1986). The Eleventh Circuit's application of *Local No. 93,* however, is in conflict with that of other Courts of Appeals. As Defendants concede, the Eleventh Circuit reads *Local No. 93* to require the consent of intervenors to any relief that might affect them in some way, regardless of whether it affects intervenors' contractual or property rights. Def. Opp. 17. Other Circuits construe *Local No. 93* to *prohibit* recognition of any such veto right except in the narrow situation where the settlement "imposes obligations on a party that did not consent to the decree," *Local No. 93*, 478 U.S. at 539, or "purports to *resolve any claims* the Union might have under the Fourteenth Amendment, . . . under § 703 of Title VII, . . . or as a matter of contract." *Id.* at 529 (emphasis added). See, e.g., *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990), *cert. denied, Makah Indian Tribe v. United States*, 501 U.S. 1250 (1991); *United States v. Communidades Unidas Contra La Contaminacion,* 204 F.3d 275, 279 (1st Cir. 2000);

Tennessee Assoc. of Health Maintenance Org., Inc. v. Grier, 262 F.3d 559, 567 (6th Cir. 2001).

Defendants also try to avoid the circuit conflict by arguing cases that involve the compromise of a Union's contractual rights without the Union's consent.[1] This case, however, raises no such issue; Intervenors sought no protection of contractual rights affected by the settlement. Instead, they seek merely to contest the merits of whether the affected minority employees (or employee as the case may be here) were really the victims of race discrimination.

Defendants argue Intervenors must have the right to insist upon a full trial on the merits of whether each black employee is, in fact, a victim of racial discrimination because if they are not, Intervenors' right to "compete" will be adversely affected. Def. Opp. 13. The Seventh Circuit explained the flaw in Defendants' reasoning in *Airline Stewards*.

> Intervenors essentially ask this court to require in excess of 100 mini-trials on issues dealing with the adequacy of each plaintiff's complaint and the availability of defenses. It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately the merits of each claim. . . .
>
> The only argument that intervenor offers to support a contrary result is that the district court had a duty to consider the interests of the incumbent employees before approving the settlement. We have no quarrel with that general proposition, but it certainly does not lead to the conclusion that the

1. *E.g.*, (1) *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998); (2) *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981); and (3) *Local No. 93*, 478 U.S. at 529.

> court had a duty to litigate the merits of the plaintiffs' claims prior to approving the settlement.

Airline Stewards, 573 F.2d at 963-964 (citation omitted).

Intervenors have not brought any discrimination claims themselves under the Equal Protection Clause, Title VII or any other law, but have only intervened to block settlement of black employees' claims against such discrimination. As this Court held in *Local No. 93*, "[i]t has never been supposed that one party — whether an original party, a party that was joined later, or an intervenor — could preclude other parties from settling their own disputes and thereby withdrawing from litigation." *Id.* at 528-529. Thus, "while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent." *Id.* If the current intervenors had brought substantive claims of their own, rather than merely intervened to be heard on the settlement of other parties' claims, they would have retained the right to trial on the merits *of their own claims* after the settlement of the other parties' claims has been approved. In this Court's own words, "[a] court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Id.* But Intervenors have no right to block the other parties' settlement by insisting upon a trial on the merits of such other parties' claims. *Id.*

II. THE RELIEF PROVIDED BY ARTICLE THIRTEEN, ¶4 DOES NOT ADVERSELY AFFECT ANY RIGHTS OR EXPECTATIONS OF NON-MINORITY INTERVENORS.

Contrary to Defendants' assertions, the settlement at issue does not provide "automatic promotions" or deprive any non-minority of a right to compete for a vacancy or promotion. The plain words of Article Thirteen, ¶4 provide for "reclassifications," not "promotions." App. D-52a; App. F-74a-76a; App. B-17a, 27a. Reclassifications, unlike promotions, involve reallocating an employee's *existing* position to a new classification. The reclassified employee has already won the position through competition and is simply having that same position placed in the correct classification and pay range for the duties he has been performing.[2]

State merit-system law requires such reallocations so that employees in "positions requiring duties which are substantially similar in respect to the authority, responsibility and character of the work required in the performance thereof" are included in the same classification that "shall be designated by a Title indicative of such duties."[3] *Ala. Code* § 36-26-13 (1975). The applicable state statute further requires that "[e]ach class

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2. An apt analogy would be to a school system that gives classroom teachers holding a master's degree a new title and compensates them on a different pay schedule. Placing a wrongfully classified teacher with a master's degree into the proper classification would not affect that teacher's duties (teaching in the assigned classroom) or fill a position that someone else could otherwise compete to fill. Such reclassification would correct the wrong, but would have no effect on the rights or benefits of any other teacher in the system.

3. Contrary to the Eleventh Circuit's assumption, there is no state merit system law that requires "competition" for the "reclassifications" involved in Article Thirteen, ¶ 4 of the settlement.

shall be so defined that the same requirements as to education" and "the same schedule of pay can be made to apply with equity under like working conditions." *Id.* The Rules of the State Personnel Board require that "[w]hen it is found . . . that a position is not in the most appropriate class, the Director shall reallocate it to the most appropriate class." *Rules of The State Personnel Board of Alabama* § 679-X-7-.06 (1993).

The settlement at issue was found by the district court to affect "fewer than a handful of African-Americans. . . ." App. B-39a.

> The record is unclear at this time, but it appears that there may be only one African-American (Benjamin Egiebor) to whom ¶ 4 still applies. App. B-39a n.20.

The terms of Article Thirteen, ¶4 restrict reclassification to persons who have been employed with a civil engineering degree but were placed in the wrong classification for persons with such an education. Defendants' argument that they are not "victims" of discrimination because they did not apply or show they were qualified is contrary to the plain terms of Article Thirteen, ¶4 which restrict eligibility for reclassification to persons who are already employed (hence, had applied for employment) and have the relevant qualification for the Graduate Civil Engineer classification — a degree in civil engineering or civil engineering technology. These *agreed-upon* criteria insure that only someone shunted into the wrong classification because of the defendants' discriminatory EIT practices would benefit from the operation of ¶4.[4]

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4. Defendants and Intervenors also urge that the Eleventh Circuit correctly reversed the district court because ¶4 was approved *sua sponte* independently. Defs. Opp. 27; Intvrs. Opp. 6-8. A motion to approve all of the provisions of Consent Decree II was, however, before the court so it makes little sense to characterize the district court's action as being

(Cont'd)

III. DESPITE DEFENDANTS' ARGUMENTS, THE CIRCUITS DO NOT AGREE ON A PARTY'S RIGHT TO WITHDRAW FROM SETTLEMENT.

Petitioners have demonstrated that the Circuits do not agree on whether a party may withdraw unilaterally from a consent decree. See Pet. 15-21. Defendants argue that no conflict exists, because this case is unique: the Intervenors did not consent, and the relief awarded does not satisfy "strict scrutiny." This is but another way of arguing that the Defendants could withdraw their consent because the settlement had legal flaws. Def. Opp. 23-26. These grounds do not avoid the circuit conflict on this issue.

First, Defendants contend that the Intervenors' refusal to consent authorized their withdrawal from the settlement.[5] Defendants below knew that the Intervenors did not consent to the settlement at the time the settlement agreement was submitted to the trial court. The Intervenors participated in

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on its own motion. Nor was the court's action a surprise since it had asked the parties to brief the impact of that provision. Respondents' efforts to support the Eleventh Circuit's result because the district court's action amounted to an impermissible "blue lining' of a "contract" also fail. When the parties divided the original Consent Decree into three sections it was precisely to facilitate independent scrutiny of and passage of judgment on various provisions of the decree. Moreover, in context, Article 13, ¶4, belonged to Consent I, with the remainder of Article 13, which had long been approved by the court.

5. Defendants concede that the Eleventh Circuit was wrong in stating that they had withdrawn their consent from the settlement. Def. Opp. 7. Defendants advocated rejection of a settlement they previously accepted, and the Eleventh Circuit ruled that this rejection alone, even if Defendants' claims of illegality or unconstitutionality were meritless, was sufficient to preclude approval of the settlement. This is a matter as to which the circuits conflict.

negotiations, and their participation led to the creation of the three-part consent decree. This refusal did not lead the defendants to withdraw their consent; they knew about it all along. *Id.* 3-4.

The Eleventh Circuit's decision in this case and the Fifth Circuit's decision in *Ibarra* permit a party to withdraw its consent to a settlement. *See* App. A-11a-13a; *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 879 (5th Cir. 1987) (permitting withdrawal from settlement on the grounds of mistake). In contrast, the other Circuits do not permit withdrawal of consent to settlement even where there are changed circumstances, much less where circumstances remain the same. In *United States v. North Carolina*, 180 F.3d 574 (4th Cir. 1999), the State was not permitted to withdraw its consent to a settlement, even after the enactment of State law requiring approval of settlements by the State legislature and attorney general. *Id.* at 581. *See also Moore v. Beaufort County*, 936 F.2d 159, 164 (4th Cir. 1991) (withdrawal not permitted, even after county board of commissioners learned of public opposition to the settlement). Similarly, the Third Circuit, in *George Banta Co. v. NLRB*, 604 F.2d 830 (3d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), held that an employer could not withdraw from a settlement, even when the union representing its employees brought new claims against the employer. *Id.*, 604 F.2d at 834. *Compare Collins v. Thompson*, 679 F.2d 168, 172-73 (9th Cir. 1982) (withdrawal not permitted for any reason because contract has been formed).

Furthermore, this Court has already rejected Respondents' argument that non-minorities must consent to settlements between governmental employers and their black employees. *Local No. 93*, 478 U.S. at 529. As explained above, intervenors only have veto rights if the settlement "imposes obligations on a party that did not consent to the decree," or "purports to resolve

any claims the [intervenor] might have under the Fourteenth Amendment, . . . Under § 703 of Title VII, . . . or as a matter of contract." *Id.*, 478 U.S. at 529, 530. Thus, the Intervenors' refusal to consent cannot justify unilateral withdrawal from a settlement; their consent is unnecessary in the first place.

Defendants' only other argument is a subjective concern that the settlement may not pass "strict scrutiny" under the Fourteenth Amendment. Under the precedent of the Third, Fourth and Ninth Circuits, this is no ground for withdrawal. If the settlement fails strict scrutiny, it will not be approved and no issue of unilateral withdrawal ever arises. And if the settlement satisfies strict scrutiny, as it did here, there is no need to withdraw because the settlement has been found to be lawful. *See Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986) (reversing appellate court's decision to require payment of attorneys' fees as part of settlement after concluding that they were required by 42 U.S.C. § 1988; court must reject a settlement it concludes is unlawful).

Despite Defendants' arguments, the circuit conflict remains. Three circuits have held that parties may not withdraw unilaterally from their settlements for *any* reason, while the Eleventh Circuit has permitted withdrawal for any reason, including concerns about strict scrutiny that the trial court definitively rejected.

CONCLUSION

This case presents a unique opportunity for the Court to resolve two important circuit conflicts. Certiorari should be granted.

Respectfully submitted,

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